

PROVIDING FOR THE DISTRIBUTION OF FUNDS APPROPRIATED TO PAY A JUDGMENT AWARDED TO THE SISSETON AND WAHPETON TRIBES OF SIOUX INDIANS IN INDIAN CLAIMS COMMISSION DOCKETS NUMBERED 142 AND 359, AND FOR OTHER PURPOSES

SEPTEMBER 23 (legislative day, SEPTEMBER 15), 1986.—Ordered to be printed

Mr. ANDREWS, from the Select Committee on Indian Affairs,
submitted the following

REPORT

[To accompany S. 2118]

The Select Committee on Indian Affairs, to which was referred the bill (S. 2118) to provide for the distribution of funds appropriated to pay a judgment awarded to the Sisseton and Wahpeton Tribes of Sioux Indians in Indian Claims Commission dockets numbered 142 and 359, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

The amendments are as follows:

1. On page 3, line 4, after the term "467)," insert "as amended,".
2. On page 4, delete all of sections 4, 5 and 6 and insert in lieu thereof the following new section 4:

SEC. 4. (a) The provisions of section 2 and section 4 of the Act of October 19, 1973 (87 Stat. 466), as amended, which require submission of distribution plans to the Congress shall not be applicable to plans developed under this Act.

(b) Any funds distributed per capita under the provisions of this Act shall be subject to the provisions of section 7 of the Act of October 19, 1973 (87 Stat. 468), as amended.

PURPOSE

S. 2118 was introduced by Senator Andrews, for himself and Senators Burdick and Pressler, on February 27, 1986. S. 2118 will supersede the Act of October 25, 1972 (86 Stat. 1168) which provided for distribution of funds awarded the Sisseton and Wahpeton Tribes of Sioux Indians by the Indian Claims Commission in dockets numbered 142 and 359, by removing the undistributed share of

the lineal descendents and redirecting distribution of that share to the three groups of Sioux Indians that constitute Federally recognized tribes or bands. With limited exception, the funds can only be used for program purposes and not be distributed per capita.

BACKGROUND

In 1967 the Indian Claims Commission, in the case of *Sisseton and Wahpeton Bands or Tribes, et al. v. United States*, 18 Ind. Cl. Comm. 477 (July 25, 1967), entered a judgment in favor of the claimants for tribal lands allegedly taken by the United States in violation of certain treaty commitments made to the Sisseton and Wahpeton Bands or Tribes of Sioux Indians. The claims set forth in Docket Nos. 142 and 359 were prosecuted solely by the Sisseton-Wahpeton Sioux Tribe of the Lake Tr  verse Indian Reservation and the Devil's Lake Sioux Tribe of the Devil's Lake Sioux Indian Reservation. However, the Sioux Tribe or Band of the Fort Peck Indian Reservation who were a descendant entity of the treaty tribes were joined as parties petitioner just prior to final judgment with the stipulation that whether the Fort Peck Sioux would be entitled to share in the judgment funds would be left for determination by the Secretary of the Interior and Congress.

When legislation was proposed to provide for distribution of the award, the Department of the Interior took the position that although the Sisseton-Wahpeton, Devil's Lake Sioux, and the Assiniboin  -Sioux Tribes were ethnohistorically and politically representative of a portion of the aggrieved aboriginal bands, nevertheless because of historical events the Department recommended participation of descendants who were not enrolled with these successor tribes. Legislation was introduced in both Houses of Congress in the 91st Congress with differing proposals for distribution. The Senate bill would have limited participation in the award to persons of one-quarter degree or more Sisseton and Wahpeton Sioux blood; the House bill would have simply apportioned the award on the basis of descendancy without regard to tribal enrollment or degree of Sisseton and Wahpeton blood.

A compromise was reached in the 92nd Congress with enactment of P.L. 92-555 (Act of October 25, 1972; 86 Stat. 1168) which provided for apportionment of the funds between the three successor tribes and the unenrolled descendants. The division was premised on the basis of the 1909 McLaughlin annuity roll which was used because it was the earliest full roll that would be acceptable to everybody and which was reasonably certain to have identified all Sissetons and Wahpetons. While each of the three successor tribes limited enrollment to persons with specific degrees of Sisseton and Wahpeton blood quantum, no blood quantum was fixed for persons under the descendancy class.

The 1972 Act provided for distribution on the following basis:

Devil's Lake Sioux Tribe of N.D.....	21.6892
Sisseton-Wahpeton Sioux of S.D.....	42.9730
Assiniboin�� and Sioux of Montana	10.3153
All other Sisseton and Wahpeton Sioux descendants	25.0225

The Devil's Lake Sioux Tribe and the Sisseton-Wahpeton Sioux Tribe received full distribution of their respective shares in 1974

and the Assiniboine-Sioux Tribe of Fort Peck received a partial distribution of its share in 1979. In each case the funds were distributed per capita to the tribal members as follows:

Apr. 18, 1974—SWST—6,006 × \$376.77	\$2,262,880.62
Dec. 16, 1974—DLST—2,187 × \$559.61	\$1,223,867.07
May 1, 1979—Ft. Peck (partial)—3,602 × \$185.00	\$666,370.00

Subsequent to the partial payment to the Fort Peck group, 34 additional members were determined eligible. As of March 13, 1986, \$194,646.85 remained in the escrow account for that group. S. 2118 will not affect that account.

The lineal descendants' share of the funds has remained undistributed since enactment of the Act in 1972. The Department of the Interior indicates that this descendancy share is now in excess of \$6 million. In 1979 the Aberdeen Area Director sent 1,935 lineal descendants a letter acknowledging their eligibility to participate in the award. In addition, there is an estimated 250 appeals awaiting decision by the Department. Subsequent to the 1979 mailout to potential descendant distributees, the Departments computer files were destroyed and the Area Office will now have to rebuild the files from previous hard copy. The Department estimates that resolving the outstanding appeals and rebuilding the computer files will take between 6 months and a year. The Committee directs that this work proceed to completion.

LEGISLATIVE HISTORY

S. 2118 was introduced on February 27, 1986, by Senator Andrews, for himself and Senators Burdick and Pressler. The bill was referred to the Senate Select Committee on Indian Affairs which held hearings on the matter on April 17, 1986. There is no companion bill in the House of Representatives. S. 2118 was considered by the Select Committee at a business meeting on September 15, 1986, and was ordered reported out of Committee with amendments.

COMMITTEE RECOMMENDATIONS AND TABULATION OF VOTE

The Select Committee on Indian Affairs, in open business session on September 15, 1986, with a quorum present, by a vote of six in favor and three opposed, recommends the Senate pass S. 2118, as amended. Senators voting in favor were Senators Andrews, Goldwater, Murkowski, Abdnor, Inouye and Burdick. Those opposed were Senators Gorton, Melcher and DeConcini.

COMMITTEE AMENDMENTS

The Committee recommends two amendments which are set out at the front of this Report. The first amendment is technical in nature. The second tracks an Administration recommendation that the requirement for submission of the judgment fund distribution plan to Congress under the Indian Judgment Fund Distribution Act of 1973 (87 Stat. 468), as amended is waived.

SECTION-BY-SECTION ANALYSIS

Section 1 supersedes that section of the 1972 Act which provided for distribution to the lineal descendants, and provides that their

share shall be distributed in accordance with the provisions of this Act.

Section 2 gives the percentages of the descendants' remaining share that are to be apportioned to the governing bodies of the three tribes.

Section 3 requires the Secretary to prepare a plan for distribution within 180 days, and sets certain conditions to be met if the funds are to be distributed on a per capita basis.

Section 4 waives the provisions of the Indian Judgment Fund Distribution Act of 1974 requiring the Secretary of the Interior to submit judgment fund distribution plans to the Congress and provides that funds distributed per capita under this Act shall be subject to the provisions of Section 7 of the Act of October 19, 1973 (87 Stat. 468), as amended.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 2118, as amended, as provided by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 16, 1986.

HON. MARK ANDREWS,
*Chairman, Select Committee on Indian Affairs, U.S. Senate, Hart
Senate Office Building, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 2118, a bill to provide for the distribution of funds appropriated to pay a judgment awarded to the Sisseton and Wahpeton Tribes of Sioux Indians in Indian Claims Commission dockets numbered 142 and 359, and for other purposes, as amended and ordered reported by the Senate Select Committee on Indian Affairs, September 15, 1986.

We estimate that enactment of this bill would result in no cost to the federal government or to state or local governments. S. 2118 sets forth the manner in which funds previously appropriated are to be distributed.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

RUDOLPH G. PENNER, *Director.*

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. S. 2118, as amended, will have minimal regulatory impact.

EXECUTIVE COMMUNICATIONS

The Committee received the following communications from the Department of the Interior and the Department of Justice.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, September 10, 1986.

Hon. MARK ANDREWS,
Chairman, Select Committee on Indian Affairs, Senate, Washington, DC.

DEAR MR. CHAIRMAN: This is to present our views on S. 2118, a bill "To provide for the distribution of funds appropriated to pay a judgment awarded to the Sisseton and Wahpeton Tribes of Sioux Indians, in Indian Claims Commission dockets numbered 142 and 359, and for other purposes."

We support enactment of S. 2118 provided that it is amended to bar any distribution of the judgment funds in question on a per capita basis.

Title II of the Act of October 25, 1972 (86 Stat. 1168; 25 U.S.C. 1300d) provided for the distribution of certain judgment funds awarded in Indian Claims Commission Dockets 142 and 359 to the Sisseton-Wahpeton Sioux Tribe of South Dakota, the Devils Lake Sioux Tribe of North Dakota, the Assiniboiné and Sioux Tribes of the Fort Peck Reservation in Montana, and to the lineal descendants of the historic Sisseton and Wahpeton Mississippi Sioux Tribe not enrolled with any tribe. Funds designated for per capita payments under the 1972 act have already been distributed to members of the enumerated tribes but have not yet been paid to the lineal descendants. By mid-1986, a total of 1,935 applicants had been determined eligible for such descendancy payments. In addition, 292 of the applicants determined ineligible for descendancy payments have filed appeals of which 255 have not yet been finalized.

S. 2118 amend the 1972 act by allocating the as yet undistributed lineal descendants' share of the judgment funds to the governing bodies of the enumerated tribes in accordance with a specified formula. The judgment funds could then be used under plans developed by the tribes.

As a general rule, we believe that each distribution of Indian judgment funds should benefit the aggrieved historic tribe for which the award was made. If the historic tribe is no longer in existence, we believe that judgment funds should be programmed, to the greatest extent possible, to the present-day successor tribe(s) to the historic tribe. We believe that the fact situation addressed by S. 2118 meets this policy objective because the three tribes named in the bill include nearly 12,000 of the approximately 14,000 identified lineal descendants.

We believe that where tribes constantly decapitalize themselves through per capita payment policies, we see little growth and development of tribal economies. We are therefore committed to the concept that judgment funds should be maintained whenever possible as a capital pool for individual tribes to invest. We believe that our policy enhances the objective of tribal self-determination and reflects the basic intent of Congress in the Act of October 19, 1973 (87 Stat. 466; 25 U.S.C. 1401 *et seq.*).

We know that this Committee has questioned the legal status of the rights that may have vested in the lineal descendants and

whether a Fifth Amendment taking issue is raised by S. 2118. We do not believe that any rights have vested and understand that the Department of Justice has supported this view. Moreover, under *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977), it is clear that the judgment funds at issue are tribal property in which individuals, as such, do not have an interest. The manner in which Congress decides to program a judgment award will generally not be disturbed by the courts provided that the legislative judgment can be tied rationally to the fulfillment of the unique Federal obligation to Indians. We further note that *Weeks* strongly suggests that where funds have not actually been paid out, Congress remains free to change the distribution scheme (430 U.S. at 90). Here, the Sisseton—Wahpeton lineal descendants' proportionate share of the judgment funds has never been paid to them.

In February 1986, the amount to which S. 2118 applies totaled \$6,028,244 which, if distributed per capita, would provide about \$3,000 to each of the eligible descendants. However, our experience tells us that individual payments do not generally have lasting beneficial effects. In line with this finding, we again recommend that the bill be amended to bar any per capita payments of these judgment funds.

We would be pleased to work with the Committee and its staff to ensure full consideration of our recommendation.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

ROSS O. SWIMMER,
Assistant Secretary.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, April 17, 1986.

Hon. MARK ANDREWS,
Chairman, Senate Select Committee on Indian Affairs, Washington,
DC.

DEAR MR. CHAIRMAN: This letter presents the views of the Department of Justice on S. 2118, a bill to "provide for the distribution of funds appropriated to pay a judgment awarded to the Sisseton and Wahpeton Tribes of Sioux Indians in Indian Claim Commission dockets numbered 142 and 359, and for other purposes." You have specifically requested our views as to whether S. 2118 would violate the just compensation clause of the Fifth Amendment by eliminating the lineal descendants from distribution of the judgment fund as provided for in Public Law 92-555.

As a general rule, the United States Supreme Court has deferred to congressional determinations as to what are the most efficient or best uses to which tribal funds can be put. See *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977). In that case, the Supreme Court held that Congress' exclusion of the Kansas Delawares from a distribution of judgment act (Public Law 92-456) was "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." 430 U.S. at 85. The Court noted that the

distribution authorized by Public Law 92-546 had not yet occurred and that Congress had the power to revise its original allocation. 430 U.S. at 90.

In the case of S. 2118, we do not have information before us as to the reasons for the proposed exclusion of the lineal descendants of the Sisseton-Wahpeton Sioux from the 1972 distribution of judgment act (Public Law 92-555). Without this information, we cannot assess whether the proposed exclusion meets the "tied rationally" test. However, we do note that *Delaware Tribal Business Committee v. Weeks* strongly suggests that where funds have not actually been paid out Congress remains free to change the distribution scheme. 430 U.S. at 90. Here, the Sisseton-Wahpeton lineal descendants' proportionate share of the judgment funds has never been paid to them.

The issue remains whether S. 1128 would violate the just compensation clause of the Fifth Amendment. We assume, based on the available information, that the lineal descendants of the Sisseton-Wahpeton Sioux are not a tribal entity, but merely individual Indians with no vested rights in any tribal property. 430 U.S. at 85. Accordingly, the question presented is whether Public Law 92-555 gave the lineal descendants a constitutionally protected property interest in the judgment funds in question. Where Congress has deprived individual Indians of vested property rights without providing for compensation for these rights, such action gives rise to a Fifth Amendment taking. *Irving v. Clark*, 756 F.2d 1260, 1268 (8th Cir. 1985).

In a case involving analogous facts, the United States Supreme Court ruled that a 1968 statute enlarging the class of Navajo Indians entitled to share in royalties from tribal oil and gas leases (on the Areth Extension of the Navajo Reservation added in 1933 by Congress) did not constitute a Fifth Amendment taking of any property rights of the more limited class of Navajo Indians originally designated as the beneficiaries of these royalties. *United States v. Jim*, 409 U.S. 80, 82 (1972), *reh'g denied*, 409 U.S. 1118 (1973). The Court held that the 1933 Act did "not create constitutionally protected property rights" in the Navajo Indian beneficiaries designated therein. 409 U.S. at 82. Rather, the 1933 Act merely established a distribution scheme for tribal property which Congress had the power to subsequently alter. 409 U.S. at 82. Funds appropriated to pay a judgment under the Indian Claims Commission Act are tribal property. *Delaware Tribal Business Committee v. Weeks*, *supra*, 430 U.S. at 85.

We note that none of the judgment funds in question has ever been paid to the Sisseton-Wahpeton lineal descendants. *United States v. Jim*, *supra*, indicates that even actual payment of money under a distribution scheme does not preclude an alteration of that scheme and that the alteration still does not give rise to a Fifth Amendment taking.

We hope that this information proves useful to your Committee in its consideration of S. 2118. Whether this legislation should be enacted involves policy considerations as to which the Department of Justice defers to the Department of the Interior.

The Office of Management and Budget has advised that there is no objection to submission of this report from the standpoint of the Administration's program.

Sincerely,

JOHN R. BOLTON,
Assistant Attorney General.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that S. 2118 does not amend or repeal existing law but does supercede the provisions of sections 201 and 202 of the Act of October 25, 1972 (86 Stat. 1168), by providing in section 1 of S. 2118 as follows:

That notwithstanding the provisions of sections 201 and 202 of the Act of October 25, 1972 (86 Stat. 1168), the funds appropriated by the Act of June 19, 1968 (82 Stat. 239), for the award to the Devils Lake Sioux Tribe of North Dakota, the Sisseton-Wahpeton Sioux Tribe of South Dakota, and the Assiniboiné and Sioux Tribes of the Fort Peck Reservation, Montana in dockets numbered 142 and 359 before the Indian Claims Commission, including all interest and investment income accrued, less attorney fees and litigation expenses, which have not been distributed to "All other Sisseton and Wahpeton Sioux" in accordance with the apportionment established in section 202(a) of said Act of October 25, 1972 shall be distributed in accordance with the provisions of this Act.

Existing law which will be superseded is enclosed in black brackets. Act of October 25, 1972 (86 Stat. 1168):

SEC. 202. (a) After deducting the amount authorized in section 1 of this Act, the funds derived from the judgment awarded in Indian Claims Commission docket numbered 142 and the one-half remaining from the amount awarded in docket numbered 359, plus accrued interest, shall be apportioned on the basis of reservation residence and other residence shown on the 1909 McLaughlin annuity roll, as follows:

<i>Tribe or group</i>	<i>Percentage</i>
Devils Lake Sioux of North Dakota.....	21.6892
Sisseton-Wahpeton Sioux of South Dakota	42.9730
Assiniboiné and Sioux Tribe of the Fort Peck Reservation, Montana.....	10.3153
【All other Sisseton and Wahpeton Sioux	25.0225】

• • • • •

【(c) The funds allocated to all other Sisseton and Wahpeton Sioux, as provided in subsection (a), shall be distributed per capita to the persons enrolled on the roll prepared by the Secretary pursuant to section 201(b) of this Act.】